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No. 97-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAXOR CORPORATION, *et al.*,

Petitioners,

v.

STATE OF NEW YORK DEPARTMENT OF HEALTH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of New York

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In its opposition, the New York State Department of Health spends a great deal of effort in an attempt to justify the decision to shut down the petitioners' blood bank, tissue bank and clinical laboratories despite their continued licensure by the City of New York for as long as 25 years. The list of allegations against the petitioners is an assortment of half-truths, errors and misstatements about the conduct of the petitioners' facilities which only serve to emphasize why, under the Due Process Clause, the State

must provide a meaningful opportunity to be heard prior to terminating professional licenses based on factual determinations about the "character and competence" of the licensees.

There is no question in this case that the State has a right to revoke, withhold, or deny applications for licenses where the State properly determines that the licensee or applicant is unfit to operate blood banks, tissue banks or clinical laboratories. The issue is whether, having authorized the petitioners to operate their facilities for more than two decades, the State could properly make a negative determination about their "character and competence" and terminate their right to continue operations without providing the petitioners a fair opportunity to demonstrate that the State's perceptions were misguided and that the petitioners are, in fact, qualified for continued licensure under the standards set forth in the New York Public Health Laws. The New York Court of Appeals' decision holding that the petitioners have no rights under the Due Process Clause, notwithstanding their long-standing operations pursuant to authorizations granted under State law, is in conflict with this Court's decisions and those of the federal courts of appeals. Because this conflict involves an important issue concerning the scope of the Due Process Clause of the Fourteenth Amendment that is likely to recur, the petition for writ of certiorari should be granted.

ARGUMENT

I

THE CONFLICT IS GENUINE

The Department of Health asserts that the decision below is a straight-forward application of this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972),

in which the Court held that a "property interest" under the Due Process Clause must involve a legitimate claim of entitlement to a government benefit that stems from independent sources, such as state law. Therefore, the Department of Health contends, there is no conflict between the decision below and this Court's prior rulings. The contention is wrong because *Roth* does nothing more than establish a general framework for analyzing a due process claim.

To resolve the question of whether a State can legitimately extinguish settled business expectations to continued professional licensure by shifting licensing authority from one governmental regulatory body to another, one must look beyond *Roth* to this Court's decisions in *Barry v. Barchi*, 443 U.S. 55 (1979) and *Bell v. Burson*, 402 U.S. 535 (1971). These cases, which are firmly rooted in a long line of precedent beginning with *Dent v. West Virginia*, 129 U.S. 114 (1889), establish that the operator of a business under a renewable license has a "property interest" in the continued maintenance of his business, which cannot be extinguished without minimal procedural safeguards such a hearing and an opportunity to present evidence to substantiate his qualifications to continued licensure.

The Department of Health seeks refuge from these cases by ignoring the State licensing scheme under which petitioners operated from 1971 through 1994, and focusing instead on the "considerable discretion" that the Department of Health claims to possess with respect to the approval of applications for new licenses under the 1994 amendments to the licensing statute. Having characterized the petitioners as "applicants" for licenses (despite their continued licensure and authorization to do business in New York City for more than two decades), the Department of Health argues that this Court's decisions involving

"revocation of licenses during their term" or the denial of government benefits that are "non-discretionary" have no application to the petitioners.[1] As the New York Appellate Division appropriately stated, the distinction "elevates form over substance." *See* Pet. App. B., p.16a.

Once this illusory distinction is eliminated, this case fits squarely within this Court's rulings that a State's authorization to engage in an otherwise legitimate occupation, once given, cannot be removed without due process of law. *See Barry*, 443 U.S. at 64 & n.11; *see also Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926). The contrary holding of the New York Court of Appeals conflicts squarely with these cases and with the decisions by the federal courts of appeals that apply them.

II

THE ISSUE IS IMPORTANT

The importance of the issue presented in this petition is underscored by the nature of the allegations upon which the Department of Health claims to have based its decision to terminate the petitioners' licenses, which the

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[1] In its Opposition, the Department of Health also contends that petitioners "failed even to show an entitlement to annual renewal of their City licenses prior to 1994." Cert. Opp. at 11. This contention is without merit, as there is no question that petitioners would have been entitled to a hearing upon revocation or non-renewal of their City licenses. *See* New York Public Health Law § 577[3]. Further, although the Department makes much of the fact that the City licenses required annual renewal, the "renewal" process was non-discretionary and automatic. It involved merely the submission of a card on which the licensee informed the City of its desire to renew the existing licenses.

Opposition sets forth at some length. Cert. Opp. at 5-8. The Opposition does not provide a full and fair account of the events described therein. Each event is mischaracterized and several of the charges simply are untrue. Each of these allegations could be readily explained,[2] but there is no evidence in the record to refute the charges because there is no record. There are only allegations raised by the State (which the New York Court of Appeals presumed to be true) and lawyers' arguments.

In *Dent v. West Virginia*, the Court observed that the right of every citizen of the United States to follow any lawful calling, business or profession is a "distinguishing feature of our republican institutions." *Dent*, 129 U.S. at 121. There can be no doubt that this freedom is a significant factor in the economic prosperity that the nation has enjoyed. If, however, the State can shut the doors of well-established corporations based on bald assertions about the "character and competence" of the men and women who run them, without affording any protections to

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[2] By way of example only, Dr. Feldschuh never admitted to "violations" involving the performance of tests at an "unlicensed clinic." Nor did the petitioners violate any regulations in that regard. The petitioners discovered through an internal audit that one of their employees was also performing tests at a doctor's in-office laboratory, which was fully authorized (and continues to be authorized) to perform tests that are done there. Steps were then taken to ensure that any compensation for the performance of such tests derived from the doctor who maintained the laboratory, rather than from the petitioners. Nor did the petitioners perform pregnancy tests without New York City approval. An administrative error led to the deletion of this category of tests from petitioners' licenses. City officials were informed of the error – which arose only as the result of the City's incorrect understanding that the petitioners no longer wanted to perform these tests – and the City officials said there would be no problem. During the period in question, 1992-94, the petitioners were subject to annual proficiency tests, which they passed with a 100 percent score. The flaws in the remaining allegations could similarly be readily explained if the petitioners were afforded a meaningful opportunity to explain them.

safeguard the truth or accuracy of the State's assertions, then this "distinguishing feature" of our republic no longer exists.

The right to engage in business free from arbitrary and unreasonable interference from the State – a right which even the New York Court of Appeals conceded the petitioners have (Pet. App. A., at 11a) – cannot be fulfilled if those who are engaged in business are given no meaningful opportunity to rebut the factual basis on which the State may decide to deprive them of their existence as a business within the State. *See Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179 (1951) ("It is procedure that spells much of the difference between rule by law and rule by whim or caprice.") (Douglas, J., concurring). The issue presented in this petition is an important one which deserves the attention of this Court.

CONCLUSION

For the foregoing reasons, as well as those previously set forth, the petition for writ of certiorari should be granted.

Respectfully submitted,

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